

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7446 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

PUNAMBHAI P BAROT

Versus

CHAIRMAN & MANAGING DIRECTOR

Appearance:

MR MUKUL SINHA for Petitioner

M/S TRIVEDI & GUPTA for Respondent No. 1, 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 21/03/2001

C.A.V. JUDGEMENT

This petition has been developed in two stages to give final shape. Initially in this writ petition relief was sought for quashing the notice dated 9.9.1991 (Annexure : D) (which should have been Annexure : E) with direction to the respondents to reinstate the petitioner in service with all consequential benefits. Thereafter on conclusion of departmental enquiry and upon considering the reply to the show cause notice against proposed punishment the Disciplinary Authority dismissed

the petitioner from service through order dated 9.10.1991 (Annexure : G). This order was also challenged by way of amendment to the writ petition which was granted on 16.10.1991.

2. In brief the facts giving rise to this writ petition are as under :

The petitioner was served with a charge sheet dated 11.7.1988 (Annexure : A) in which six charges were levelled against him. The petitioner submitted his reply to the charge sheet. Enquiry was conducted and ultimately the Enquiry Officer concluded in his report (Annexure : B) that all the charges, except one, alleged in the charge sheet were established against the petitioner. Show cause notice (Annexure : E) was given to the petitioner on 9.9.1991 calling upon him to show cause notice within two days of receipt of notice why he should not be dismissed from service. After considering the reply to the show cause notice as contained in Annexure:F the order of dismissal was passed by the Disciplinary Authority vide Annexure : G on 9.10.1991. Thus, Annexure : G dated 9.10.199 and Annexure : E dated 9.9.1991 are under challenge in this writ petition.

3. The stand of the respondent has been that the enquiry was conducted in accordance with rules and principles of natural justice were followed and punishment was imposed after giving an opportunity of hearing to the petitioner hence no interference in the matter is required. Objection has also been taken that writ petition is not maintainable because in view of Article 12 of the Constitution of India the respondent Corporation Petrofils Co.Operative Limited is not a State within the meaning of Article 12 hence no writ of certiorari can be issued against it under Article 226 of the Constitution of India. Another objection is that the writ petition is not maintainable because show cause notice (Annexure : E) cannot be quashed and the proper course is to approach the High Court as and when final order is passed.

4. Shri Mukul Sinha, learned Counsel for the petitioner and learned Counsel representing the respondents were heard.

5. Shri Sinha assailed the findings of the Enquiry Officer on the ground that it is perverse. He further contended that the enquiry stands vitiated due to violation of principles of natural justice. He further contended that the punishing authority did not apply its

mind in proper manner and imposed punishment of dismissal which reflects legal malafide and lastly the punishment is disproportionate to the guilt and charges established against the petitioner.

6. On behalf of the respondents three objections were raised. It is, therefore, proposed to take up those objections first.

7. In the first place it was argued that the petition is not maintainable because show cause notice against proposed punishment cannot be quashed and in this view of the matter the petition is premature. In support of this contention reliance was placed upon pronouncement of the Calcutta High Court in DAYANAND v/s. UNION OF INDIA, reported in 1977 LAB I.C. 1194. It was held in this case that the writ petition under Article 226 of the Constitution of India to quash charge sheet and second show cause notice is not maintainable because no finality has yet been reached in the departmental enquiry. However, this objection, to my mind, has become redundant when the final order was passed and the petitioner was dismissed and he was permitted by this Court to amend this petition on 16.10.1991 and was further permitted to challenge the dismissal order. Consequently after the dismissal order dated 9.10.1991 (Annexure : G) finality has been attached to the departmental enquiry and the writ petition is maintainable. The relief of quashing (Annexure : E) dated 9.9.1991 as a consequence thereof becomes infructuous and it cannot be granted.

8. The second objection has been that the respondent Corporation is not a State within the meaning of Article 12 of the Constitution of India hence the writ petition is not maintainable and no writ of certiorari can be issued against the respondent. The petition shows that the first respondent is the Chairman and Managing Director, Petrofils Co.Operative Limited whereas the 2nd respondent is Director, Petrofils Co.Operative Society, registered under the Co.Operative Societies Act and as such no writ in the nature of certiorari can be issued. At the out-set it may be mentioned that this court in Special Civil Application No.814 of 1986 allowed the writ petition against Petrofils Co.Operative Limited on 26.7.1996. In this petition this plea was not directly considered yet since this court has granted relief under Article 226 of the Constitution of India against Petrofils Co.Operative Limited it can be said that it was considered to be State within the meaning of Article 12 of the Constitution of India.

9. On behalf of the respondent reliance was upon the Apex Court's verdict in S.S.DHANOA V/S. MUNICIPAL CORPORATION DELHI, reported in AIR 1981 SC 1395, in which it was held that a Co-operative society is, therefore, not a corporation established by or under an Act of the Central or State Legislature. However, it can not be said that in the instant case the respondent is not covered under Article 12 of the Constitution of India. There are two types of Corporations. One type of corporation is which is established or created by State Legislature or by Central Legislature. The other type of corporations are where they are created and registered under the Co-operative Societies Act. The Co-operative society may not be Corporation strictly created by Central or State Legislature, but even then there is no absolute bar in granting relief under Article 226 of the Constitution of India.

10. In V. NARSING RAO v/s. THE PRUDENTIAL CO-OPERATIVE URBAN BANK LTD., reported in 1989 LAB I.C. 1971, the Andhra Pradesh High Court has held that the power under Article 226 is an extraordinary power which is not meant to replicate or supplant the existing judicial system. Certain additional powers were conferred upon the High Courts to make the existing judicial system more effective to ensure rule of law and observance of fundamental rights. It is supervisory in nature. This power cannot be used to enervate, ineffectuate, or dispense with the existing judicial system comprising ordinary Civil Courts, tribunals with special jurisdiction and innumerable quasi-judicial authorities created by various enactments. In every case where a writ is sought for the High Court will consider whether interference is called for. While so examining, the Court will have to keep in mind the several self-imposed limitations placed upon the exercise of the said power by the Courts themselves. It is also necessary to keep in mind the broad principles governing the issuance of the various writs in English Law, and the overall objective of doing justice. It cannot, therefore, be stated as a Rule of law that a writ does lie, or does not lie, against a co-operative society. Before answering the said question one has to make a further enquiry, viz. what is it that the petitioner is seeking to enforce by way of writ petition? It is the nature of the power/function/duty that is decisive. For example, if what is sought to be enforced is a statutory obligation of a public nature, a writ in the nature of Mandamus will issue against a co-operative society. Similarly, where a writ is sought to quash a quasi-judicial order passed by a co-operative society, a

writ in the nature of certiorari would lie.

11. The Apex Court in *SABHAJIT TEWARY v/s. UNION OF INDIA*, reported in AIR 1975 SC 1329 has held that the Council of Scientific and Industrial Research, a society registered under the Societies Registration Act is not an authority within the meaning of Article 12. It was further held that the society does not have a statutory character like the Oil and Natural Gas Commission, or the Life Insurance Corporation or the Industrial Finance Corporation. This observation of the Apex Court cannot be applied safely to the facts of the case before me. The Apex Court in this case observed that simply because the Prime Minister is the President or that the Government appoints nominees to the Governing Body or that the Government may terminate the membership will not establish anything more than the fact that the Government takes special care that the promotion, guidance and co-operation of scientific and industrial research and other activities of the Council towards the development of industries in the country are carried out in a responsible manner.

12. If the bye-laws of the Petrofils Co.Operative Ltd. are examined there can be no hesitation in holding that the majority of the shares of the Corporation are held by the Government and the Government, namely, the Central Government exercises effective control. Some of the bye-laws on the point can be referred.

Bye-law No.7 provides that at least 60 % of the paid-up share capital shall be held by the Government of India and other Government sponsored organisations, the remaining paid-up capital being held by the co-operatives.

This bye-law therefore provides that majority of shares, namely, 60 % shall be held by the Government of India. Bye-law No.27(iv) provides that so long as Government of India is a share-holder, it shall nominate such number of delegates not exceeding 25 on the General Body to represent it. Thus, under this bye-law 25 delegates can represent the General Body of the Corporation. Bye-law No.31 provides that notwithstanding anything contained in these bye-laws, as long as the Government of India continues to be a shareholder of Petrofils, no amendment or repeal of any existing bye-laws or the enactment of any new bye-laws shall be made by Petrofils without prior approval of the Government of India. Thus, upto this stage it is clear that majority shares are held by the Government of India. The Government of India has power to appoint 25 delegates to the General Body and if amendment in the bye-laws is

intended it cannot be done without prior approval of the Government of India. Bye-law No.49 provides that any interim vacancies in the nominated Board shall be filled by nominees of the Government of India. Thus, under this bye-law the Government of India exercises complete power to fill in interim vacancy in the nominated board. Bye-law No.53 further provides that so long as the Government of India holds more than 50 % of the share capital of the society, all the Directors, including Chairman and Vice-Chairman, shall be nominated by the Government of India, except those Directors who are nominated by the Financial Institutions/Banks in pursuance of agreements between the Society and such institutions. Thus, appointment of Chairman, Vice Chairman and all the Directors is under effective control of the Government of India. The power of appointment and remuneration of the Managing Director is also controlled by the Government of India as provided under Bye-law No.54. Bye-law No.56 contemplates that so long as Government of India is shareholder, the Director (Finance), Director (Projects) and Director (Operations) shall be whole time Officers of Petrofils and they shall receive such salary and remuneration and will be governed by such terms and conditions of the services as the Government may determine. Bye-law No.57 empowers the Government of India to remove the Chairman, Vice Chairman, Managing Director, Director (Finance), Director (Project), Director (Operations) from office at any time. Bye-law No.62 provides that notwithstanding anything contained in these bye-laws, the President of India, so long as the Government of India holds more than 50 % of the paid-up share capital of the Society, may from time to time, issue such directives or instructions as may be considered necessary in regard to the finance, conduct of business, functions and affairs of the society or of the Directors thereof and in like manner may vary and annul any such directive or instruction. The Board of Directors shall give immediate effect to the directives or instructions so issued.

13. In view of above provisions in the bye-laws it is clear that the Central Government has full and effective control over the affairs of the society and the President of India has also effective control. Consequently it cannot be accepted that no writ can be issued against such Corporation. It is certainly a Corporation effectively governed by the Government of India hence it becomes instrumentality of the State and writ jurisdiction under Article 226 of the Constitution of India can be exercised in such matter. This objection has also thus no merit.

14. Another objection in the counter Affidavit is that the writ petition involves disputed questions of fact which necessitates leading and oral evidence which cannot be decided under Article 226. I do not find any merit in this objection also because in such matters under Article 226 of the Constitution of India this Court will not enter into disputed questions of fact but simply will examine whether enquiry is conducted in accordance with law and whether rules of natural justice were followed or not. This court will not examine the material on record to substitute its own findings contrary to the findings recorded by the Enquiry Officer.

15. After meeting these objections now it is to be seen to what extent the contentions of Shri Mukul Sinha assailing the departmental enquiry can be accepted.

16. The first contention of Shri Sinha has been that the findings are perverse. I do not find any merit in this contention. A finding can be said to be perverse which is not at all based on evidence on record or which cannot be given a man of ordinary prudence. The enquiry Officer has considered material on record and has given findings. That finding cannot be said to be based on no evidence or that such view could not be taken by a reasonable man. As such it is difficult to say that the findings recorded by the Enquiry Officer are perverse. This court will not substitute its own findings after reappraising the evidence which was led before the Enquiry Officer.

17. The next contention of Shri Sinha has been that the enquiry was conducted in grave violation of the principles of natural justice. His attack has been that the relevant and material documents were not supplied to the petitioner. This contention can be accepted on the strength of material on record before me. Page : 179 of the compilation is an application by the petitioner to the Senior Packaging Officer requesting him to provide Log Book of S/I (Pkg.) containing the Log Book report of working of 16.6.1988 "C" shift (from 22.00 hours of 16.6.1988 to 06.00 hrs. of 17.6.1988). Page : 180 of the compilation shows that the petitioner demanded nine documents on 22.7.1988 and in this copy of log book was again requested to be supplied. The reply to these letters by the Packaging Officer is contained in Page : 183 of the compilation. It is dated 29.7.1988. In this, it is mentioned that the copy of log book was supplied on 22.7.1988 during enquiry proceedings. It is thus clear that the copy of log book was not supplied along with the

charge sheet. If it would have been supplied along with charge sheet the petitioner would have got effective opportunity to make his defence. Charge No.6 in the charge sheet was that the petitioner gave false information in the log book report. Consequently the log book should have been supplied to the petitioner along with the charge sheet. The charge sheet was served on 11.7.1988. Furnishing copy of log book during pendency of enquiry would certainly vitiate the enquiry because principles of natural justice were not observed. Since copies of all documents were not given to the petitioner along with the charge sheet it has also violated the principles of natural justice inasmuch as the petitioner was prevented from putting his defence effectively.

18. It is also clear from the material on record that there was no complaint in writing against the petitioner. No statement of any witness was recorded before serving the charge sheet. The names of four witnesses were given to the petitioner, but subsequently fifth witness was examined against the petitioner during enquiry. The fifth witness was Shri K.R.Tandel. The petitioner was not aware that Shri K.R.Tandel will be examined as enquiry witness against him. The principles of natural justice were further violated which is evident from the enquiry proceeding dated 27.6.1990 wherein it is mentioned that since Shri K.R.Tandel is a witness who had come on that day for examination it was decided to take his statement on that day. It may be mentioned that on that date the petitioner was not present before the Enquiry Officer. The Enquiry Officer decided to supply copy of statement of Shri K.R.Tandel during examination in chief to the petitioner later on. Firstly it is not known how the Enquiry Officer came to know that Shri K.R.Tandel was a material witness. Secondly the principles of natural justice required that if Shri Tandel was a material witness he should have been examined in presence of the petitioner. There was no hurry in conducting the enquiry and since fifth witness Shri K.R.Tandel was examined in the absence of the petitioner it has violated the principles of natural justice. Supplying copy of statement on the next date to enable the petitioner to cross-examine Shri K.R.Tandel would not meet the ends of justice nor it can be said that the principles of natural justice were observed.

19. It may also be mentioned that the show cause notice (Annexure : E) dated 9.9.1991 against proposed punishment has also violated the principles of natural justice. At least reasonable time and opportunity should have been afforded to the petitioner to represent against

the proposed punishment. In this notice only two days time was given to the petitioner from the date of receipt of notice to make his statement. Two days time can hardly be said to be reasonable time for submitting reply to the second show cause notice.

20. It is further clear that the final order was passed by the Disciplinary Authority in a mechanical manner which is evident from Annexure : G dated 9.10.1991. All the contentions of the petitioner were not specifically answered by the Disciplinary Authority. The Disciplinary Authority has simply observed as under :

"I have gone through the contentions and averments made in the said representation regarding findings of the Enquiry Officer. It has not at all convinced to reach any other conclusion than what has been arrived at in regard to the findings of the Enquiry Officer dated 20.6.1991 on proper appreciation of evidence adduced during the enquiry."

The disciplinary Authority looking to the past record of the petitioner as well as gravity of misconduct ordered dismissal of the petitioner. However, from the material on record it can hardly be said that it was grave misconduct on the part of the petitioner for which he was dismissed from the service. What emerges from the material on record is that the petitioner exercised his discretion in due course and not that he committed misconduct or grave misconduct. Absence from duty for a period of one hour is also not a grave misconduct which required punishment of dismissal.

21. Since the enquiry stands vitiated on account of nonobservance of the principles of natural justice it is not necessary to discuss in detail that the punishment awarded to the petitioner is disproportionate to the charges established against him nor it is necessary to decide whether punishment awarded by the Disciplinary Authority can be reduced. The two cases cited on the facts and circumstances of the case have only academic value. The Apex Court in STATE BANK OF INDIA v/s. SAMARENDRA KISHORE ENDOW & ANR. reported in JT 1994 (1) S.C. 217 observed that awarding of proper punishment is within the discretion and judgment of the Disciplinary Authority. The Appellate Authority may interfere with such decision or discretion, but not the High Court or the Administrative Tribunal. The Administrative Tribunal has equal powers as that of the High Court under Article 226 of the Constitution of India. In view of the Apex

Court the High Court or the Administrative Tribunal can not substitute its view on quantum of punishment and if it is found that the punishment is excessive it cannot be reduced by the High Court or by the Administrative Tribunal and the proper course is to remand the matter to the Appellate authority to impose proper punishment. It was further observed by the Apex Court that the Supreme Court can exercise equitable jurisdiction under Article 136 of the Constitution of India and the High Court and the Tribunal has no such power or jurisdiction. However, the subsequent view of the Apex Court in U.P.STATE ROAD TRANSPORT CORPN. V/S. MAHESH KUMAR MISHRA & ORS., reported in (2000) 3 SCC 450 is otherwise, wherein it has been held that the High Court was justified in interfering with the quantum of punishment and substituting reinstatement with one fourth back wages for dismissal.

22. Since in the case before me the order of dismissal cannot be sustained because principles of natural justice were not followed during enquiry the order of punishment has to be quashed and there remains no occasion for reducing the quantum of punishment.

23. Learned Counsel for the petitioner in the end contended that in case the order of dismissal is set aside by this Court it would not grant back wages to the petitioner. Reliance was placed by him on the case of The Managing Director, UP Warehousing Corporation v/s. Vijay Narayan Vajpayee, reported in AIR 1980 SC 840. The Apex Court in this case observed that it must be remembered that in exercise of its certiorari jurisdiction under Article 226 of the Constitution the High Court acts only in supervisory capacity and not as an Appellate Tribunal. It does not reevaluate the evidence upon which the inferior tribunal proposes to base its conclusion. It simply demolishes the order which it considers to be without jurisdiction or manifestly erroneous but does not as a rule substitute its own view for those of the inferior tribunal. It was further observed that in matters of employment while exercising its supervisory jurisdiction under Article 226 of the Constitution over the orders and quasi-judicial proceeding of Administrative Authority not being a proceeding under Industrial/Labour Law before the Industrial/Labour Tribunal culminating in dismissal of the employee the High Court should ordinarily in the event of dismissal being found illegal simply quash the same and should not further give a positive direction for payment to the employee full back wages as a consequence of the annulment of the dismissal, the position as it

obtained immediately before the dismissal is restored. Such peculiar powers can properly be exercised in a case where the impugned adjudication or award has been given by an Industrial Tribunal or labour Court. That was not the case where Industrial/Labour Tribunal gave any award. Two reasons were given by the Apex Court for not awarding the back wages. The first was that it is a question of fact depending upon evidence to be adduced before the Tribunal whether the employee should be given full back wages or not. For this it has to be determined whether or not the employee was gainfully employed elsewhere during continuance of enquiry proceeding. Further, latest view of the Apex Court on the subject is to be found in the case of UP STATE ROAD TRANSPORT CORPN. v/s. MAHESHKUMAR (supra) where it has been observed that after quashing the order of dismissal the High Court can direct reinstatement with one fourth back wages for dismissal. If this is the latest view of the Apex Court then following the same the petitioner is entitled to reinstatement with 25 per cent back wages.

24. For the reasons given above the petition succeeds and is hereby allowed. The impugned order of dismissal contained in Annexure : G dated 9.10.1991 is set aside. The petitioner shall be reinstated forthwith with 25 per cent back wages and continuity of service with all consequential retirement benefit. No order as to costs.

sd/-

Date : March 21, 2001 (D. C. Srivastava, J.)

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